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No. 10-1260

Supreme Court, U.S.
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In The

Supreme Court of the United States

CLINTON GARD AND PATRICIA GARD,

Petitioners,

vs.

CITY OF OMAHA, NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Nebraska

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioners' Writ of Certiorari appears to raise the following three questions:

1. Did the Nebraska Court of Appeals correctly affirm the decision of the Douglas County District Court granting summary judgment to Respondent?

2. Did the Nebraska Court of Appeals violate Petitioners' right to due process by affirming Douglas County District Court's decision granting Respondent's summary judgment?

3. Did the decision of the Nebraska Court of Appeals invoke the supervisory powers of the United States Supreme Court by granting Respondents' summary judgment?

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CITATION OF OPINIONS AND ORDERS BELOW

Nebraska Court of Appeals: *Gard v. City of Omaha*, 18 Neb. App. 504, 786 N.W. 2d 688 (2010), *review denied* by Nebraska Supreme Court, November 10, 2010.

Douglas County District Court, J. Patrick Mullen, Order Granting Defendant's Motion for Summary Judgment dated November 30, 2009.

BASIS OF JURISDICTION

In their Petition for Writ of Certiorari, Petitioners assert that jurisdiction is proper under 28 U.S.C. § 1257(a). See Petition, pg. 1. Title 28 U.S.C. § 1257(a) expressly states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority.

Petitioners contend that basis for jurisdiction is that the Court of Appeals' affirmation of the District Court's granting of Defendant's summary judgment is in conflict with other State court of appeals decisions. Petition, pg. 6. On November 10, 2010, the Nebraska Supreme Court declined to hear Petitioners' case. See Petition, pg. 1. This case does not involve a federal question nor is there a conflict between jurisdictions on an important federal question. Based on the foregoing, there is no basis for viewing this as a Petition for an Extraordinary Writ.

CONSTITUTIONAL AND STATUTORY PROVISIONS (EXCERPTED)

28 U.S.C. § 1254(1):

> **Courts of appeals, certiorari; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

Rules of the Supreme Court of the United States, Rule 10:

Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has

> decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

NEB. REV. STAT. § 13-902 (Reissue 2007):

> . . . [N]o suit shall be maintained against such political subdivision or its officers, agents or employees on any tort claim except to the extent, and only to the extent, provided by the Political Subdivision Tort Claims Act.

NEB. REV. STAT. § 13-919(1) (Reissue 2007):

> Every claim against a political subdivision permitted under the Political Subdivisions Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by the act shall be forever barred unless begun within two years after such claim accrued . . .

STATEMENT OF THE CASE

Clinton and Patricia Gard ("Petitioners") seek a writ of certiorari from the United States Supreme Court. On March 16, 2009, Petitioners filed an action

in Nebraska state court under the Nebraska Political Subdivision Tort Claims Act, NEB. REV. STAT. § 13-901 et seq. (Reissue 2007). The Petitioners alleged the City of Omaha ("Respondent") was negligent by failing to install a guardrail or berm to protect their private property from errant vehicles. They further alleged the Respondent is responsible for the damage to their residence, the diminution in value of their property, and the loss of use and enjoyment of their backyard. The Respondent filed an answer denying liability. The parties proceeded with discovery. The Respondent moved the District Court for a summary judgment based on the Petitioners' untimely filing of their claim and their subsequent lawsuit. The parties submitted briefs and the District Court heard oral arguments. On November 30, 2009, the District Court granted Defendant's Motion for Summary Judgment based on Petitioners' failure to timely file the tort claim and the lawsuit within the statutory time period.

On December 16, 2009, Petitioners filed their appeal of the District Judge's order to the Nebraska Court of Appeals. The parties submitted briefs and the Court of Appeals heard oral arguments before a three judge panel (Moore, Cassel, Chief Judge Inbody). On August 3, 2010, the Court of Appeals released a written, published opinion affirming the judgment of the District Court. Petitioners then filed a motion for rehearing which was overruled on September 1, 2010. Petitioners filed a petition for further review to the Nebraska Supreme Court which was

denied on November 10, 2010. Petitioners then filed a motion to stay mandate and a motion to reinstate the appeal which were both overruled on November 19, 2010. Finally, Petitioners filed a motion to reconsider and amend the petition for further review and motion to stay mandate which was overruled on November 24, 2010.

STATEMENT OF FACTS

The genesis of Petitioners' claim surrounds their unrelenting obsessive mission to seek monetary compensation for the diminution of their property which they attribute to the City's negligence in not installing a guardrail or a berm to protect their property from errant vehicles.

The following material facts adduced on the Respondent's motion for summary judgment were undisputed and required entry of summary judgment in favor of the City:

1. Petitioners own the property at 931 North 121st Street, Omaha, NE 68154, which is directly west of the intersection of 120th Street and Miracle Hills Drive ("T-intersection").

2. When Petitioners purchased the subject property, their backyard faced the three westbound lanes at the T-intersection. Nebraska Court of Appeals Transcript, pg. 5 (hereinafter the Court of Appeals' Transcript is referred to as "T").

3. From December 2000 to January 2001, the City Council held three separate hearings on the proposed Ordinance 35432 which included the turning lane improvements at the T-intersection. (T159) Design of the turning lane improvements occurred in 2000. Nebraska Court of Appeals Bill of Exceptions, Exhibit 1, 8-17:8, Vol. II (hereinafter the Bill of Exceptions' Exhibits are referred to as "E").

4. On January 8, 2001, Council approved the Development Agreement which included turning lane improvements at the T-intersection. (E1, 18:8, Vol. II)

5. The turning lane improvements at the T-intersection lanes reconfigured the three westbound lanes (which faced Petitioners' back yard) into two left hand turning lanes and two right hand turning lanes. (E1, 14, 16:8, Vol. II)

6. Construction of the turning lane improvements was performed after Petitioners purchased their property. (E6, 22:8, Vol. II)

7. On October 21, 2006, a vehicle driven by a drunk driver proceeding west through the T-intersection left the roadway and entered Petitioners' property. Immediately after the accident, Patricia Gard telephoned the City and spoke with Harry Owen of the City's Traffic Maintenance Division about her concerns relating to the accident which occurred and voiced her concerns about the redesign of the turn lanes at the T-intersection. Complaint, paragraph 5 (T1-2). Deposition of Patricia

Gard 24:5-26:4; 37:25-39:7; 40:2-41:23 (E6, 24-26, 37-39, 40-41:8, Vol. II).

8. After the October 21, 2006 accident, Patricia Gard thought that there were problems with the intersection and was concerned about the "very, very" heavy flow of traffic caused by the redesign. Deposition of Patricia Gard 36:17-37:3.

9. After the first auto accident on October 21, 2006, the Petitioners concluded that there was a problem with the four lane T-intersection and the location of their property. Deposition of Clinton Gard 10:15-24; 12:2-6.

10. As of October 30, 2006, the Petitioners' main concern was about the traffic lane and traffic signal design at the T-intersection and voiced such concerns to the City of Omaha. Deposition of Patricia Gard 21:20-24:4, 40:14-24; 41:19-44:5, 46:20-49:23. Deposition of Clinton Gard 10:15-24; 12:2-6.

11. On October 30, 2006, Harry Owen responded to Petitioners' concerns in writing indicating that the accident history for the T-intersection shows no other accidents of that kind reported in the previous 10 years. Mr. Owen informed Petitioners that guardrails are not to be used to protect private property abutting the roadway because the City could be liable if a car strikes something that the City has placed in the right of way. He also provided Petitioners with information from the National Cooperative Highway Research Program, Report 350.

12. On November 2, 2006, Petitioners sent Mr. Owen a lengthy correspondence outlining their concerns about the traffic lane redesign at the T-intersection. Petitioners stated that the recent design changes to the T-intersection increased the chance of errant vehicles coming onto their property because of the allegedly increased amount of overflow traffic from Dodge Street.

13. Petitioners again wrote to Mr. Owen on December 1, 2006, to argue their position that the City could make the intersection safer while not inconveniencing drivers or increasing the City's liability. Petitioners indicated that their situation should be an exception to the City's guidelines for putting a barrier at the T-intersection. Owen Affidavit, Exhibit D (E2, 3, 8:8, Vol. II).

14. On December 26, 2006, Mr. Owen emailed the Petitioners informing them once again that the City could not place any form of barricade at the T-intersection due to safety concerns for motorists.

15. On April 24, 2007, the second auto accident caused by one driver "blacking out" at the wheel and rear-ending another vehicle resulted in the vehicles entering Petitioners' property. Complaint paragraph 7 (T2). Deposition of Patricia Gard 32:17-34:7.

16. On April 25, 2007, Petitioners wrote to the Mayor's Office complaining that the City added westbound lanes which increased the flow of traffic towards their house and requested that the safety issues at the T-intersection be addressed.

17. In response to Petitioners' letter to the Mayor's Office, on May 7, 2007, Todd Pfitzer, the City's Traffic Engineer, wrote to the Petitioners and explained to them the dangers to motorists of installing a guardrail or barrier at the intersection. He also explained that placing each signal head on separate poles would create a hazardous condition which could lead to injury of a motorist who traveled west through the intersection. Mr. Pfitzer told Petitioners that the City cannot install a device that would very likely cause severe injuries to a motorist who mistakenly proceeds through the T-intersection. Mr. Pfitzer offered to increase the size of the diamond-shaped reflector signs to the maximum allowable size to emphasize to approaching motorists that the roadway ends and does not continue west through the intersection.

18. The City of Omaha agreed to bring the matter before the Nebraska Department of Roads Safety Committee ("Committee") for discussion. The matter was heard by the Committee on June 12, 2007, and, again on July 10, 2007. After discussion, the Committee decided it could not fashion a solution that would provide reasonable safety for both motorists and the Petitioners.

19. On September 10, 2007, Todd Pfitzer received an email from Yodock Wall Company wherein Leo J. Yodock, President, reiterated that the Yodock barriers have not been crash tested at T-intersections such as the one in question. The email confirms an earlier telephone conversation between Mr. Yodock

and Todd Pfitzer and states that Yodock will not likely be able to find an engineer willing to "sign off" on the installation simply based on theoretical analysis rather than actual crash tests.

20. On October 2, 2007, Todd Pfitzer responded to the Petitioners' concerns once again, indicating that the City contacted a manufacturer of highway barriers to inquire into the feasibility of constructing a roadway barrier for this situation. Mr. Pfitzer indicated that the manufacturer had informed the City that it would not provide a barrier because of the lack of testing with respect to 90-degree impacts and the potential liability of installing an untested device.

21. Petitioners knew or should have discovered the existence of their possible claim against the City by, at the latest, October 21, 2006, when the accident alerted them to the possible claim and Petitioners complained to the City about it. Complaint paragraph 5 (T1-2). Deposition of Clinton Gard 12:2-6. Deposition of Patricia Gard 37:25-39:7.

22. Petitioners' Notice of Tort Claim pursuant to NEB. REV. STAT. § 13-901, alleging that they sustained damages due to the City's failure to remedy a dangerous condition at the T-intersection, was not filed with the Omaha City Clerk until April 22, 2008.

23. On March 16, 2009, Petitioners brought this lawsuit alleging negligence in the design of the T-intersection which they allege increased the danger to Petitioners; negligence in failing to protect their property from errant vehicles; and seeking damages

and injunctive relief against the City of Omaha. Petitioners did not plead any facts or arguments regarding equitable estoppel. Complaint paragraphs 1-15. (T1)

24. Petitioners do not know of any law or regulation that would require the City to install a guardrail or barrier in between 120th Street and their backyard. Deposition of Patricia Gard 58:9-12. Deposition of Clinton Gard 17:13-19.

25. The City's Public Works personnel used their experience and engineering judgment to determine how best to accommodate increasing traffic in the area and secure public safety. The T-intersection was redesigned in 2000-2001 to add turning lanes for westbound Miracle Hills Drive, to better accommodate increasing traffic in that area and in the westbound direction. The redesign was a discretionary use of engineering principles.

26. The proposed City Council Ordinance No. 35432 which included the proposed turning lane improvements at the T-intersection was published on December 15, 2000, in The Daily Record of Omaha. (T158). Ordinance No. 35452 was passed at the January 8, 2001, City Council meeting. (T157).

27. The proposed City Council Ordinance No. 35637 for construction of turning improvements at the T-intersection was published on June 22, 2001, in The Daily Record of Omaha. (T193). After the first, second and third readings (and public hearing) on Ordinance No. 35637 were held, the Omaha City

Council approved the construction of the turning lane improvements at the T-intersection.

ARGUMENT

I. THE LOWER COURTS' GRANTING OF SUMMARY JUDGMENT TO RESPONDENT DOES NOT WARRANT REVIEW BY THIS COURT

A. This Case Does Not Involve Any Important Federal Question Requiring Review From This Court

United States Supreme Court Rule 10 describes the considerations governing the grant of writs of certiorari. Initially, the Rule states that review on a writ of certiorari is not a matter of right, but of judicial discretion. "A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, S.Ct. Rules. Rule 10(a) and (c) involve certain decisions on "important federal question[s]."

Petitioners are unhappy because the District Court determined that they had failed to file their tort claim and their lawsuit within the prescribed statutory timeframe. This is clearly not an "important federal question" pursuant to Rule 10 of the Supreme Court Rules. The Petition has presented three questions for review. However, a review of those questions indicates that Petitioners do not allege that the Nebraska Supreme Court entered a decision that conflicts with a decision of another State court of last

resort. Moreover, Petitioners do not allege that the issues they raise in their Petition are important federal questions that need to be resolved by this Court. Instead, a close reading of the issues demonstrate that Petitioners are asking this court to review pretrial discovery orders, evidentiary rulings, and other rulings by the lower courts. Notably, Petitioners did not raise in the courts below any constitutional question which they now urge this Court to consider.

B. A Writ Is Rarely Granted For A Misapplication Of Law Claim

Rule 10 adds that a petition for a writ of certiorari is "rarely granted" for "erroneous factual findings or the misapplication of a properly stated rule of law." The latter is the situation in the present case. Petitioners argue that the lower courts "misapplied" Nebraska law by erroneously applying the statute of limitations and failing to apply the continuing tort and equitable estoppel doctrines to toll the statute of limitations.

Petitioners fail to acknowledge that the only true issue is whether they timely filed their tort claim and lawsuit under the Nebraska Tort Claims Act.[1]

---

[1] NEB. REV. STAT. § 13-919(1) expressly states that every claim against a political subdivision permitted under the Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body.

Petitioners' argument regarding what other State courts have done with regard to granting summary judgment while discovery is ongoing is misplaced. None of the cases cited by Petitioners address a case where the lawsuit is dismissed for lack of jurisdiction based on a statute of limitations defense versus a factual issue. Thus, the Petition for Writ of Certiorari asserts nothing more than the "misapplication of a properly stated rule of law." Pursuant to Supreme Court Rule 10, certiorari is "rarely granted" under those circumstances. Accordingly, certiorari should not be granted on this issue.

C. In The Proceedings Below Petitioners Did Not Raise A Constitutional Challenge

Petitioners have manipulated the questions presented in an attempt to have the writ granted. The questions presented and identified as 1, 2, and 3 are in no way similar to the questions that have previously been heard by the District Court or the Nebraska Court of Appeals. A review of the lower courts' decisions that appear in Petitioners' Appendix make this clear. See Petition, App. 1, App. 16. The only issues the Douglas County District Court heard were Petitioners' allegation of Respondent's negligence, allegations of incomplete discovery responses against Respondent, and Respondent's statute of limitations defense under the Nebraska Tort Claims Act. Moreover, the only issues heard by the Nebraska Court of Appeals were Petitioners' allegations of the

District Court's error in granting the summary judgment and their request to apply the doctrines of equitable estoppel and continuing tort against Respondent's statute of limitations defense. A review of the three questions presented by the Petitioners demonstrates no circumstances exist for which this Court typically grants a writ of certiorari.

D. Due Process Was Satisfied In This Case

The Petitioners have mischaracterized the facts in the hopes of persuading this Court that there has been a constitutional deprivation of their due process rights by the Nebraska Court of Appeals. They repeatedly contend that facts are being intentionally hidden by Respondent and intentionally not addressed by the lower courts. Petitioners would have you believe that Respondent intentionally mislead, fraudulently concealed or misrepresented facts in order to delay filing of Petitioners' tort claim until they were outside of the time period allowed under the statute. However, there was never any such concealment or misrepresentation. The record is devoid of any type of concealment or misrepresentation. Respondent informed Petitioners repeatedly that it could not and would not install a guardrail or berm to protect private property.

Petitioners go further with their mischaracterization and allege they were denied due process because of an ongoing conspiracy between the City of Omaha, the Honorable J. Patrick Mullen of the Douglas

County District Court and the Justices of the Nebraska Court of Appeals; with all three agents acting as a "tag team" working together to "avoid the facts." The essence of due process is that a person be given notice and an opportunity for hearing. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). This due process requirement applies where a property interest is being taken away. In this case there has been no property deprivation by the government, just damage to property caused by the random acts of the negligent drivers.

Furthermore, these issues were not raised in the lower courts. The evidence presented does not support their assertions. Petitioners are simply trying to avoid the true issue at hand: whether they filed their tort claim and lawsuit on time. They conveniently do not address in their Petition why they did not file their tort claim within the time allowed. The evidence introduced to the lower courts shows that Petitioners simply failed to file their claim on time and the failure to file was not caused by any misrepresentation or concealment of facts by Respondent. Notably, no amount of speculation about what evidence would possibly have been discovered can turn back the clock and reverse their mistake.

II. THE NEBRASKA COURT OF APPEALS DID NOT ERR IN UPHOLDING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

Although the Petition presents new and creative arguments before this Court, the specific issues Petitioners brought before the Nebraska Court of Appeals were: (1) whether the district court erred by not applying the continuing tort doctrine to the statute of limitations; (2) whether the district court erred by not applying the equitable estoppel doctrine; and, (3) whether the district court erred in granting Respondent's Motion for Summary Judgment while discovery was continuing. The Court of Appeals considered the statutory framework, the record before them and the oral arguments, before rejecting Petitioners' theories asserted to excuse the untimeliness of their filings. Petition, App. 14.

A. Petitioners Filed Their Tort Claim Out Of Time

Petitioners are under the mistaken belief it does not matter that the District Court dismissed their lawsuit for lack of jurisdiction (statute of limitations defense) because they have an absolute due process right to present all of their evidence and have their day in court. This is ignoring the statutory framework under which they brought their cause of action.

In Nebraska, to establish a tort claim against a political subdivision such as the City of Omaha, a

claimant must file a written claim within one year from the time the cause of action accrued. NEB. REV. STAT. §§ 13-905 and 13-919 (Reissue 2007). Compliance with the notice requirement of NEB. REV. STAT. § 13-905 is a procedural precedent to commencement of an action under that Act; noncompliance with the notice requirement is a defense to causes of action to recover in tort. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W. 2d 207 (1990). The notice of claim requirements of the Tort Claims Act is a condition precedent to the institution of suit against a political subdivision. *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W. 2d 102 (1986). A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action. *Ward v. City of Alliance*, 227 Neb. 306, 417 N.W. 2d 327 (1988). "In the absence of a statute providing otherwise, ignorance of the existence of a cause of action ordinarily does not toll the statute of limitations, particularly where the facts may be ascertained by inquiry or diligence." *Ward*, 227 Neb. at 310, quoting 54 C.J.S. *Limitations of Actions* § 205 at 216 (1948).

The Nebraska Court of Appeals' opinion in this case cited and applied these same rules. See *Gard*, 18 Neb. App. 504, 786 N.W. 2d 688 (2010). The Court of Appeals' opinion correctly cited the rule from *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 554 N.W. 2d 636 (1996), which states that a cause of action accrues, thereby starting the period of limitations,

when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence.

Notably, the Petition for Writ of Certiorari does not appear to contest the constitutionality of the Nebraska Tort Claims Act statute of limitations for a tort claim against a municipality, as stated and applied by the Court of Appeals. See Petition, App. 9. Thus, there appears to be no grounds under Supreme Court Rule 10 for granting writ of certiorari on this claim. To the contrary, Petitioners merely reargue the facts and assert new facts, pointing only to the fact that discovery was continuing and the Respondent was subject to a motion to compel; thus the District Court should not have granted Respondent's summary judgment. Petition, pp. 15-16. Again, these asserted errors are nothing more than allegations of "the misapplication of a properly stated rule of law" – matters for which certiorari should be "rarely granted," under Supreme Court Rule 10.

B. Petitioners Failed To Allege And Prove Any "Continuing Tort" That Extended The Accrual Of The Cause Of Action

In their Appellate Brief pp. 15-19, Petitioners argued for the first time that the trial court erred by granting summary judgment without applying the doctrine of continuing tort to toll the statute of limitations found in NEB. REV. STAT. § 13-919. The Nebraska Court of Appeals denied application of the

doctrine because it requires that a tortious act – not simply the continuing ill effects of prior tortious acts – fall within the limitations period. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W. 2d 376 (2007). The Court of Appeals emphasized that the necessary tortious act cannot merely be the failure to right a wrong committed outside the statute of limitations, because, if it were, the statute of limitations would never run because a tortfeasor can undo all or part of the harm. Citing *Alston*, 273 Neb. at 426. See Petition, App. 11. The court also held that no Nebraska case law has applied the doctrine to claims brought under the Tort Claims Act, and they declined to do so in this case. Petition, App. 12.

C. Petitioners Failed To Properly Plead And Prove Equitable Estoppel

In their Appellate Brief, Petitioners argue for the first time that the district court erred by granting the summary judgment without applying the doctrine of equitable estoppel. They argued that ending their case on a statute of limitations basis due to the delay in filing their claim would cause manifest injustice. However, the District Court could not consider the equitable estoppel argument because Petitioners never made it in any previous oral argument, brief or pleading.

The Court of Appeals reasoned that the doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling

circumstances where right and justice so demand. *Lowe v. Lancaster Cty. Sch. Dist.* 0001, 17 Neb. App. 419, 766 N.W. 2d 408 (2009). The Court of Appeals stated that equitable estoppel is an affirmative defense and must be raised in the pleadings to be considered by a trial court and on appeal. *Victory Lake Marine v. Velduis*, 9 Neb. App. 815, 621 N.W. 2d 306 (2000). Notwithstanding the fact that the Petitioners asserted equitable estoppel in avoidance of the statute of limitations rather than as an affirmative defense, the Court of Appeals held that the Petitioners' pleadings did not sufficiently allege equitable estoppel. See, generally, *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W. 2d 668 (1997).

The Court of Appeals further held that even if Petitioners had properly pleaded equitable estoppel, they could not establish the six elements for estoppel to apply. See also *Lowe, supra*.

CONCLUSION

Petitioners have very creatively attempted to mischaracterize and manipulate the issues to make it appear that they have suffered a constitutional deprivation so this Court will grant certiorari. However, the issues as presented by Petitioners do not satisfy the requirements of Supreme Court Rule 10 for those cases in which this Court exercises its discretion to grant certiorari.

Following the guidelines of Supreme Court Rule 10, the Petition for Writ of Certiorari should be denied. Furthermore, the Petition should be denied because Plaintiff's assigned errors are unsupported by the record and lack merit.

Respectfully submitted,

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